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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

NO. 9

RALPH D. ABERNATHY, CLYDE CARTER, WILLIAM S. COFFIN, JR., JOSEPH CHARLES JONES, BERNARD S. LEE, JOHN DAVID MAGUIRE, GAYLORD B. NOYCE, FRED L. SHUTTLESWORTH, GEORGE SMITH, DAVID E. SWIFT, and WYATT TEE WALKER

Petitioners

v.

ALABAMA,

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF ALABAMA

BRIEF FOR RESPONDENT

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STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Each petitioner was convicted under Title 14, Section 407, Code of Alabama 1940 (Recompiled 1958):

> "If two or more persons meet together to commit breach of the peace, or to do any other unlawful act, each of them shall, upon conviction, be punished, at the discretion of the jury, by a fine and imprisonment in the county jail, or hard labor for the county, for not more than six months."

Each petitioner, except Walker, was also convicted under Title 14, Section 119(1), Code of Alabama 1940 (Recompiled 1958):

> "Any person who disturbs the peace of others by violent, profane, indecent, offensive or boisterous conduct or language or by conduct calculated to provoke a breach of the peace, shall be guilty of a misdemeanor, and upon conviction shall be fined not more than five hundred dollars ($500.00) or be sentenced to hard labor for the county for not more than twelve (12) months, or both, in the discretion of the court."

These cases also involve the freedom of expression and assembly clauses of the First Amendment to the Constitution of the United States; the equal protection and due process clauses of the Fourteenth Amendment to the Constitution of the United States; and the due process clause of Article 1, Section 6, Alabama Constitution of 1901.

QUESTIONS PRESENTED

I.

WHETHER PERSONS WHO, WITH FULL KNOWLEDGE OF A TENSE SITUATION, DELIBERATELY ENGAGE IN CONDUCT CALCULATED TO PROVOKE A BREACH OF THE PEACE, ARE CONSTITUTIONALLY IMMUNE FROM PROSECUTION FOR SUCH CONDUCT.

II.

WHETHER PERSONS WHO EMBARK ON AN AVOWED MISSION OF DISTURBING PEACE AND TRANQUILITY IN A COMMUNITY CAN SEEK REFUGE IN THE CONSTITUTION OF THE UNITED STATES AS

> menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions excitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order appears, the power of the State to prevent or punish is obvious."

The principle was again well stated by Mr. Chief Justice Vinson in *Feiner v. New York*, 340 U.S. 315, 319, 95 L.Ed. 295, 299, where it was said:

> "We are not here faced with blind condonation by a State court of arbitrary police action. The trial judge had testimony supporting and contradicting the judgment of the police officers that a clear danger of disorder was threatened. After weighing this contradictory evidence, the trial court reached the conclusion that the police officers were justified in taking the action to prevent a breach of the peace. The exercise of the police officers' proper discretionary power to prevent a breach of the peace was thus approved by the trial court and later by two courts on review. The courts below recognized petitioner's right to hold a street meeting at this locality, to make use of loud-speaking equipment in giving his speech, and to make derogatory remarks concerning public officials and the American Legion. They found that the officers in making the arrest were motivated solely by a proper concern for the preservation of order and protection of the

general welfare, and that there was no evidence which could lend color to a claim that the acts of the police were a cover for suppression of petitioner's views and opinions. Petitioner was thus neither arrested nor convicted for making or the content of his speech. Rather, it was the reaction which it actually engendered . . . The findings of the New York courts as to the condition of the crowd and the refusal of petitioner to obey the police request, supported as they are by the record in this case are persuasive that the conviction of petitioner for violation of public peace, order and authority does not exceed the bounds of proper police action. This court respects, as it must, the interest of the community in maintaining peace and order on its streets."

In a concurring opinion appearing in 95 L.Ed. at page 280, Mr. Justice Frankfurter said of the police that.

> "They interfered only when they apprehended imminence of violence. It is not a constitutional principle that, in acting to preserve order, the police must proceed against the crowd, whatever its size or temper, and not against the speaker."

Mr. Justice Frankfurter also said at page 279 that the Supreme Court:

> ". . . should not re-examine determinations of the State courts on 'those matters which are usually termed issues of fact.' And it should not overturn a fair appraisal of facts made by State courts in the light of their knowledge of local conditions."

The same principle should govern this Court in considering the present cases.

The City of Montgomery, Alabama, at the time the arrests were made, had been placed under martial rule and the National Guard had been sent into the city for the purpose of helping to maintain law and order. The Sheriff of Montgomery County was working with the National Guard officers and cooperating with them in the unified over-all efforts to prevent riots and bloodshed. The arrests were made in pursuance of a direct order from the National Guard Commanding Officer. The arrests were entirely justified under the prevailing conditions of unrest and tension and were made only after all reasonable efforts to quell the menacing riots had proved unsuccessful. There is no evidence that the arrests were made in pursuance of any policy, practice, custom, or usage to enforce segregation of the races.

The petitioners, as part of the "Freedom Ride Movement," had broadcast their intention to create agitation in Montgomery well in advance of their arrival. Extensive efforts were made on their behalf to insure that a tense atmosphere would await them.

The petitioners were thus in an "explosive situation," one in which they had placed the explosive elements and to which they attempted to light a fuse. They were arrested because a riot was threatened—a riot which they were inciting.

The Supreme Court of the United States, as a matter of principle, has consistently recognized that a constitutionally protected right does not render immune actions or utterances tending to incite an immediate breach of the peace or riot, but that, when such conduct produces a clear and present danger to a substantial interest of the State, or of a serious substantive evil, it may be stopped or regulated. *Gitlow v. New York*, 268 U.S. 652, 667, 69 L.Ed. 1138, 1146, 45 S.Ct. 625; *Whitney v. California*, 274 U.S. 357, 374, 71 L.Ed. 1095, 1104, 47 S.Ct. 641.

In their Brief, the petitioners rely heavily on *Barr v. City of Columbia* (June 22, 1964), ... U.S. ....., 12 L.Ed.2d 766. That case is so factually distinguishable from the case at bar that it is no authority for the theory which they attempt to advance here. In *Barr*, there is no evidence of a mob assembled outside the drug store, no evidence of previous violence, no evidence of an "electric" and tense atmosphere, and no evidence of public hostility, as here.

B

UNLAWFUL ASSEMBLY

An assembly of persons together for the effectuation of even a lawful purpose, by means such as would give rational, firm, and courageous persons in the neighborhood of the assembly a well-grounded fear of a breach of the peace, is an unlawful assembly.

It is undisputed from the evidence in this case that some of the petitioners assembled together to ride buses through the State of Alabama, and to use all of the facilities which were an integral part of the bus stations, knowing full well that under the conditions then prevailing their actions in doing so would give any rational, firm, and courageous persons in the neighborhood a well-grounded fear of a breach of the peace.

Although the petitioners state in their brief that "their purpose was to demonstrate to the country that Negro travelers very often did not enjoy equal rights secured by the law" (Petitioners' Brief, page 4), it must be borne in mind that this particular ride was initiated by four white men, namely, Coffin, Maguire, Noyce, and Swift, and one Negro, Smith (R. 180-182). It is thus difficult to understand by what mental process these white theologians arrived at the conclusion that their riding buses through Alabama could

menacing public order and tranquility. It includes not only violent acts but acts and words likely to produce violence in others. No one would have the hardihood to suggest that the principle of freedom of speech sanctions excitement to riot or that religious liberty connotes the privilege to exhort others to physical attack upon those belonging to another sect. When clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order appears, the power of the State to prevent or punish is obvious."

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possibly "demonstrate to the country that Negro travelers very often did not enjoy equal rights secured by the law," even if such were a fact.

The only logical conclusion, as is evidenced by their teaming up with the Negroes, Smith, Carter, Jones, Abernathy, Shuttlesworth, Lee, and Walker was to assemble as a group in order to further aggravate an already tense situation and to provoke further breaches of the peace. Their motives being clear, as shown by their actions under the prevailing circumstances, they were thus clearly guilty of unlawful assembly.

The futility of attempting for future guidance to adopt an inflexible definition of all circumstances and conditions which might arise in the course of human events to denominate an assembly as unlawful is obvious. As was said in *State v. Butterworth*, 104 N.J.L. 579, 142 At. 57, 58 ALR 744, 748:

> "Each case largely and necessarily depends upon the object and character of the meeting, and whether or not the overt acts done by the participants therein, was pursuant to a common understanding, or of such a nature as to inspire well-grounded fear in persons of reasonable firmness and courage of a riot, rout, affray, or other breach of the public peace."

After discussing the case of *Reg. v. Graham*, 16 Cox C.C. 420, 46 Am. Jur. 128, that court went on to say:

> "The legal principle, however, to be extracted from the cases at common law, seems to be that in order to constitute the offense of unlawful assembly, it must appear that it was a common intent of the persons assembled to attain a purpose, whether

lawful or unlawful, by the commission of such acts of intimidation and disorder which are likely to produce danger to the tranquility and peace of the neighborhood, and have a general tendency to inspire rational, firm, and courageous persons in the neighborhood with well-grounded fear of serious breaches of the public peace."

Again, we say that *Barr v. City of Columbia*, ... U.S. ....., 12 L.Ed.2d 766, 769, is not applicable because the facts in that case are clearly distinguishable from the case at bar.

II.

PERSONS WHO EMBARK ON AN AVOWED MISSION OF DISTURBING PEACE AND TRANQUILITY IN A COMMUNITY CANNOT SEEK REFUGE IN THE CONSTITUTION OF THE UNITED STATES AS AGAINST THE POLICE POWER OF A STATE TO PRESERVE SUCH PEACE AND TRANQUILITY.

In *Kovacs v. Cooper*, 336 U.S. 77, 93 L.Ed. 513, 69 S.Ct. 448, 10 ALR 2d 608, a case involving the limitation and regulation of sound trucks in public streets, this Court said:

> "Of course, even the fundamental rights of the Bill of Rights are not absolute. The *Saia* case (334 U.S. 558, 92 L.Ed. 1574, 68 S.Ct. 1148) recognized that in this field by stating: 'The hours and place can be controlled.' It was said decades ago in an opinion of this Court delivered by Mr. Justice Holmes, *Schenck v. United States*, 249 U.S. 47, 52, 63 L.Ed. 470, 473, 39 S.Ct. 247, that: 'The most stringent protection of free speech would not protect a man falsely shouting fire in a theater and causing a panic. It does not even protect a man from an in-

junction against uttering words that may have all of the effect of force.'

"Hecklers may be expelled from assemblies and religious worship may not be be disturbed by those anxious to preach a doctrine of atheism. The right to speak one's mind would often be an empty privilege in a place and at a time beyond the protecting hand of the guardians of public order."

Constitutional rights of assembly are not absolute and unlimited at all times and under all circumstances. The Constitution does not give immunity to and does not prevent the punishment of those who abuse constitutional freedoms and does not imply the right to paralyze the means for effective protection of all the freedoms secured by the Bill of Rights, nor does the Constitution give so-called "Freedom Riders" the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all depends. *Toledo Newspaper Co. v. United States*, 247 U.S. 402, 62 L.Ed. 1186, 38 S.Ct. 560.

The essential rights of the First Amendment in some instances are subject to the elemental needs for order without which guarantees of Civil Rights of others would be a mockery. *United Public Workers v. Mitchell*, 330 U.S. 75, 95, 91 L.Ed. 754, 770; 67 S.Ct. 556.

In the case of *Powers Mercantile Co., et al. v. Olson, Governor of Minnesota*, 7 F.Supp. 865, the Court held that:

"Under military rule, constitutional rights of individuals must give way to the necessities of the situation; and the deprivation of such rights, made necessary in order to restore the community to order under law, cannot be made the basis for injunction or redress."

Under the clear and present danger doctrine—a clear and imminent danger of some substantive evil—the State was justified in taking preventive action.

It is not a question of the constitutionality of petitioners' actions in utilizing the facilities involved. The question is whether the arrests were made under a justifiable situation.

III.

IT IS NOT IN THE INTEREST OF THE COMMON WEAL TO PERMIT INTERLOPERS TO DISTURB PEACE AND GOOD ORDER, BY WAY OF "DEMONSTRATIONS," WITHOUT RESORT TO THE COURTS FOR THE VINDICATION OF THEIR CLAIMED "RIGHTS" UNDER THE CONSTITUTION.

Of the eleven petitioners who were arrested and convicted, seven were participants in the "Freedom Ride."

Coffin was the University Chaplain at Yale University; Maguire and Swift were Professors of Religion at Wesleyan University; Noyce was a Professor at Yale University; Smith was a student at Yale Law School; and Carter and Jones were theological students from North Carolina (R. 180 - 184).

It is obvious from the testimony of their spokesman, Coffin, that the traveling petitioners were not bona fide travelers in interstate commerce, but were traveling solely for the purpose of "demonstrating" in an area which was already in a tense situation and where matters were already at a fever pitch, of which they were well aware before they undertook the trip and which they further aided, abetted, and encouraged by their advance publicity. Their sole and only purpose then could be nothing other than to add fuel to a fire which the authorities were doing everything in their

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ganized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses." *Cox v.* [*State of*] *New Hampshire*, supra [312 U.S. 569] at 574 [61 S.Ct. 762, 85 L.Ed. 1049].'

"The activity of the Congress of Racial Equality representatives and those acting in concert with them in this district and within this State, the activity of the Southern Christian Leadership Conference representatives and those acting in concert with them in this district and within this State, the Student Nashville Non-Violent Movement and those acting in concert with them, individuals F. L. Shuttlesworth, Ralph D. Abernathy, Solomon S. Seay, Sr., Martin Luther King, Jr., Wyatt Tee Walker, and those acting in concert with these individuals in sponsoring, encouraging, assisting and publicizing the so-called 'Freedom Riders,' or other like groups who are presently engaged in 'agitating within the law,' is just as effectively causing an undue burden and restraint upon the free flow of interstate Commerce in this State and district as is the activity of the other defendants in this case. All are due to be enjoined and/or restrained from such further activities that produce this evil result."

Thus, it will be seen that the very Federal Court on which the petitioners so heavily rely found as a fact that the petitioners, Abernathy, Shuttlesworth, and Walker, as well as possibly others, including Martin Luther King, Jr., who encouraged these riders (see R. 200) were directly responsible for creating the situation of which they now complain.

We respectfully submit that it is foreign to our American system to throw a cloak of constitutional protection around those who think they can pick and choose the laws which they must obey.

CONCLUSION

WHEREFORE, for the foregoing reasons, the judgments below should be affirmed.

Respectfully submitted,

RICHMOND M. FLOWERS
Attorney General of Alabama

LESLIE HALL
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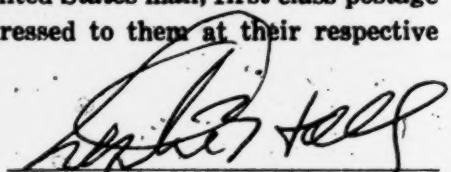
of Alabama

Administrative Building
Montgomery, Alabama 36104

Attorneys for Respondent

CERTIFICATE OF SERVICE

I, Leslie Hall, one of the attorneys for the Respondent, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23rd day of September, 1964, I served the requisite number of copies of the foregoing brief upon Jack Greenberg, Constance Baker Motley, James M. Nabrit, III, Suite 2030, 10 Columbus Circle, New York, New York 10019, Fred D. Gray, 34 North Perry Street, Montgomery, Alabama, and Louis H. Pollak, 127 Wall Street, New Haven, Connecticut, Attorneys for Petitioners, by depositing the same in the United States mail, first class postage prepaid, and properly addressed to them at their respective addresses.



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